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IN THE

# Supreme Court of the United States

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FAX.COM, INC.,

*Petitioner,*

v.

STATE OF MISSOURI EX REL. NIXON,
ATTORNEY GENERAL, *et al.*

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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## BRIEF *AMICI CURIAE* OF RESOURCE BANK, DRURY INNS, INC. AND PERRY JOHNSON, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## INTEREST OF AMICI CURIAE[1]

Resource Bank, Drury Inns, Inc., and Perry Johnson, Inc. (collectively referred to as "Amici") respectfully submit this brief in support of Petitioner. Counsel for each party has consented to the filing of this brief.

Although Amici are three diverse businesses—a Virginia bank, a Midwest-based hotel chain, and a worldwide training and consulting organization—all of them utilize the fax machine to communicate time-sensitive information regarding their products and services to consumers. Consequently, each also bears the title of defendant in class action lawsuits pending throughout the United States alleging violations of the Telephone Consumer Protection Act (the "TCPA") and seeking millions of dollars in statutory damages. As such, Amici have a direct, profound, and continuing interest in this case.

**1. Resource Bank.**

Resource Bank ("Resource") is a Virginia chartered regional commercial bank, headquartered in Virginia Beach. Established in 1988, Resource has branches in Virginia Beach, Chesapeake, Newport News, Richmond and Herndon, Virginia. It also has mortgage offices in the States of Maryland, North Carolina and Florida. Resource is a wholly owned subsidiary of Resource Bancshares Corporation.

Resource offers its customers traditional banking services including deposit accounts, consumer loans and commercial loans. Resource also offers its banking services through its online "eBranch." Resource and daily mortgage bankers necessarily rely heavily on the use of faxing as a means of communicating time-sensitive information, such as

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[1] Pursuant to Supreme Court Rule 37.6, amici state that this brief was authored in part by Greensfelder, Hemker & Gale, P.C., co-counsel for Petitioner Fax.com. Greensfelder, Hemker & Gale, P.C. also serves as counsel for amici Resource Bank and Drury Inns, Inc. in class-action lawsuits pending in Indiana and Missouri, respectively. No person or entity, other than amici, made a monetary contribution to the preparation or submission of this brief.

the best mortgage products that are tied to hourly fluctuating wholesale interest rates, to existing and potential customers.

Resource is a defendant in a putative class action lawsuit pending in the Circuit Court of Marion County, Indiana. The named plaintiff and putative class representative is a law firm that allegedly received a one-page fax pertaining to home mortgage products from Resource. Plaintiff in that action seeks to certify a nationwide class and recover millions of dollars in statutory damages from this FDIC insured bank.

**2. Drury Inns, Inc.**

Drury Inns, Inc. ("Drury") is a family owned and operated chain of hotels located in 17 states in the Midwest and Southeast United States. The brands operated by Drury include Drury Inn, Drury Inn and Suites, Drury Suites and Pear Tree Inn.

In the aftermath of September 11th, and with no knowledge of the TCPA, Drury engaged in a single fax campaign offering incentives for "last-minute" reservations in an attempt to fill vacancies. Drury now finds itself a defendant in a class action lawsuit pending in the Circuit Court of St. Louis County, Missouri, in which two named plaintiffs on behalf of a putative class seek thirty million dollars in statutory damages.

**3. Perry Johnson, Inc.**

Perry Johnson, Inc. ("PJI") is a Michigan-based company that specializes in training and consulting with other businesses regarding compliance with quality system management standards requirements established by the International Organization for Standardization ("ISO") and other standardization organizations. PJI communicates by fax with its clients and potential clients regarding, among other things, ISO upgrades and changes that affect the private and public sectors.

PJI went to great lengths and considerable expense to comply with state laws regulating fax advertising. Despite its efforts, PJI is the defendant in a class action lawsuit pending

in the Superior Court of San Mateo, California, in which a class already has been certified. While PJI would like to fax information to its clients regarding ISO upgrades and changes and its training and consulting services, it has stopped all faxing activity for fear of violating the TCPA.

## SUMMARY OF ARGUMENT

Amici present this brief to underscore that fax advertising is not, as many lower courts have mistakenly assumed in perfunctorily rejecting First Amendment attacks on the TCPA, the exclusive province of so-called "junk" advertisers. Rather, fax advertising is a critically important tool of commercial communication relied on extensively and effectively by a host of mainstream businesses, such as Amici. It is essential for the efficient operation of certain businesses and industries, such as mortgage bankers and the travel industry, which need to communicate time-sensitive information to the public, or to target a specific demographic, or both. Each of these businesses has a constitutional right to communicate this commercial information to their existing and potential customers.

Nor can it be assumed, again as many lower courts have wrongly done, that unsolicited fax advertisements bother every recipient. In fact, many recipients respond favorably to unsolicited fax advertising. Many rely on such valuable, time-sensitive information to keep pace in the information age and make informed commercial decisions in constantly fluctuating markets. Without a receptive audience, fax advertising would have died a natural death long ago. No business would continue to advertise by fax if it did not receive positive consumer feedback in the form of increased sales. These fax recipients also enjoy a constitutional right to receive such commercial information.

Both the TCPA and the Eighth Circuit's flawed decision below ignore these constitutional rights of businesses such as Amici, and their customers and potential customers who welcome and even rely on unsolicited faxes containing

valuable, time-sensitive commercial information. Instead, Congress and the Eighth Circuit impermissibly exalted the rights of objecting recipients—rights which are not enshrined in the constitution—over these constitutional rights.

In so doing, neither Congress nor the Eighth Circuit meaningfully considered alternative, more narrowly tailored methods of regulation that would protect the interests of both fax advertisers and non-objecting recipients, on the one hand, and objecting recipients, on the other hand, and place the choice where this Court has held it belongs–with the consumer. Congress instead unconstitutionally substituted its judgment for that of businesses and consumers regarding the value of commercial advertisements. Adding insult to constitutional injury, Congress proceeded to subject unwary firms such as Amici to strict liability and huge damages whether or not they even knew about the TCPA's fax ban, simply because they communicated truthful, valuable commercial information via fax.

The TCPA's constitutional infirmity is further demonstrated by the Act's irrational prohibition on sending an unsolicited fax advertisement to a recipient that has not provided "express invitation or permission," without carving out an exception for an existing business relationship. Thus, *any* attempt by companies such as Amici to advertise via fax is accompanied by the substantial risk of potentially devastating liability.

Congress, with the Eighth Circuit's blessing, irrationally and arbitrarily singled out truthful commercial speech and subjected it to punitive regulation. The purported justification for the TCPA was to prevent shifting pennies in paper and toner costs from the advertiser to, and interfering with the use of a fax machine by, objecting recipients. Yet the Act's myopic ban on commercial ads alone bears no relationship whatsoever to these putative interests, for both commercial and non-commercial faxes cause these "harms."

In straining to overturn the District Court's decision and uphold the TCPA, the Eighth Circuit disregarded or distorted

this Court's more recent decisions applying the *Central Hudson* test. Should the Court allow that fatally flawed decision to stand, it is questionable whether any of the Amici will retain the financial wherewithal to raise these issues with the Court once a final judgment is rendered in their cases. Amici are not alone. Business of all types—not just FDIC insured banks, consulting firms, and hotel chains—face devastating financial consequences, including bankruptcy, as a result of the TCPA. The TCPA's draconian liability and damages scheme may thus ironically insulate its unconstitutional restrictions on commercial speech from ultimate review here. Amici present this brief now to bring to the Court's attention the presumably unintended consequences for mainstream businesses of a constitutionally-flawed statute.

## REASONS FOR GRANTING CERTIORARI

### I. The TCPA's Prohibition On Facsimile Advertising Unconstitutionally Eliminates A Uniquely Efficient and Affordable Method Of Marketing.

According to the Relocation Information Service, Inc., the mortgage industry accounts for nearly 25 percent of the fax broadcasting market, with other financial services comprising 11 percent. *NAR Secures Stay to Clarify Do-Not-Fax Rule* (http://sss.rismedia.com/index.php/article/articlestatic/4681/1/1/) (Oct. 23, 2003). The products offered by banks, especially investment products and loans, are tied to government interest rates that react to changing political and economic conditions, and thus fluctuate on a daily and sometimes hourly basis. These ever-changing variables require banks to communicate with customers and potential customers at a moment's notice. Thus, banks frequently communicate with mortgage brokers, correspondents, automobile dealerships and others via fax to promote products and advertise available interest rates. Many of these lenders rely heavily on "rate sheets" that are faxed one or

more times per day. An interest rate based product that is available now may be gone in a day or even an hour.

Similarly, the travel industry must have a means of immediately communicating vacancies on cruise ships, in hotels, or on airplanes. Travel businesses have regularly used the fax machine to communicate short-term promotions and special rates to travel agents and other interested parties. Fax advertising generates millions for the travel industry each year, provides outstanding savings to consumers, and has helped stabilize an industry still reeling in the wake of September 11th.

The ability to communicate the availability of goods or services to a mass audience is especially important today when information is communicated globally in seconds, and the maintenance of open lines for the dissemination of commercial information is more important than ever. One of the most efficient and effective methods of prompt communication available is the fax machine. Faxing is virtually the only medium that makes wide dissemination of time-sensitive information possible on an immediate and targeted basis. It also allows consumers to compare readily the products offered by competing firms. An individual can receive a fax advertisement without having to speak with a salesperson. In most cases, a fax recipient need not be logged in at a computer. Faxing accomplishes all of these things with unique affordability, and is thus particularly attractive to small businesses that cannot afford to advertise though expensive and often ill-suited print or broadcast media.

The TCPA severely handicaps businesses and industries by depriving them of this invaluable and uniquely immediate medium of communication. The TCPA's effective ban of advertising by fax the "commercial availability or quality of any property, goods, or services" prevents firms like Amici from sharing valuable information with consumers who want it. This prohibition, when combined with the ever expanding restrictions on phone solicitations and the movement toward broadly circumscribing all electronic solicitations, including

e-mail, makes it impossible for certain companies, including scores of small businesses, to advertise time-sensitive products in the small window of opportunity existing at any given time.

This ban will reduce many companies to passive marketing, in which the consumer initiates contact with firms they already know. Smaller businesses will suffer because they cannot afford to advertise by expensive broadcast media, publication or direct mail as effectively and as frequently as larger firms. Willing recipients will pay more or get less without information about more competitive pricing and products. Many markets and industries thus will operate less efficiently.

These TCPA-driven phenomena are anathema to this Court's landmark commercial speech decision in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Recognizing that the public has a constitutional right in the free flow of commercial information, the Court extended First Amendment protection to commercial speech to ensure that consumers have the information they need to buy safe products at competitive prices. Four years later, the Court adopted the four-part *Central Hudson* test to determine whether restrictions on commercial speech violate the First Amendment. *Central Hudson*, 447 U.S. at 564.

Applying this test, the United States District Court for the Eastern District of Missouri held that the TCPA's prohibition on faxing was unconstitutional. The District Court reasoned that the government had not established a substantial interest for the fax ban. The court also found that the TCPA's no-fax provisions are neither narrowly tailored, nor a direct fit to serve the interests asserted by Congress. Pet. App. 37a-41a.

In reversing the District Court's judgment, the Eighth Circuit failed to consider the cases succeeding *Central Hudson* that demonstrate the ever-increasing rigor with which this Court scrutinizes commercial speech restrictions. Instead, the Eighth Circuit performed a perfunctory, results-

oriented analysis that distorted the holdings of this Court and relied on lower court decisions that likewise failed to apply the *Central Hudson* test properly. Through this faulty analysis, the appellate court sanctioned the TCPA's effective elimination of an entire medium of advertising.

In this way, both the TCPA and the Eighth Circuit's decision conflict with this Court's recent decision in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). There, the Court held that state regulations banning certain outdoor ads for tobacco products, which effectively prohibited all outdoor ads in certain urban areas, violated the First Amendment. *Id.* at 562. Despite the state's "compelling" and "substantial" interest in preventing underage tobacco use, the interests of the tobacco retailers and manufacturers "in conveying truthful information about their products to adults, and ... corresponding interest [of adults] in receiving truthful information about tobacco products" were protected under the First Amendment. *Id.* at 564. The Court held that the paternalistic regulation was unconstitutional because the legislature "cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Id.* at 566.

The paternalistic justification for the TCPA's burden on speech is ostensibly to prevent the use of the objecting recipient's paper, toner and fax lines. By contrast, the Court observed in *Lorillard* that prohibiting billboards near schools and playgrounds was unconstitutional, despite the fact that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." 533 U.S. at 570 (internal citation omitted). If prohibiting billboard advertising could not be justified by preventing the most significant health risk in the country, it is inconceivable that a blanket ban on fax advertising could be justified by preventing advertisers from shifting the pennies in cost of paper and toner, or occupying fax machines.

The *Lorillard* Court also acknowledged that certain businesses or industries have a free speech interest in the ability to propose an immediate transaction. *Id.* at 565. "[A] retailer ... may have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement ... do not allow the retailer to propose an instant transaction." *Id.* Again, each Amici needs to immediately notify customers of time-sensitive products or services. Under the TCPA, however, a wide array of firms such as Amici are prohibited from using the most rapid and efficient delivery process to do so. Any effort to that end will subject the sender to private causes of action, enforcement by the attorney general, FCC fines and class action lawsuits that literally can break the bank.

The TCPA's heaviest burden is imposed on smaller businesses that cannot afford print, radio and television advertising. As the Court noted in *Lorillard,* "[i]f some retailers have relatively small advertising budgets, and use few avenues of communication, then the ... regulations potentially place a greater, not lesser, burden on those retailers' speech." 533 U.S. at 564-65. Even for those who can afford it, traditional media often are inadequate because they cannot accommodate either the rapid changes in information, such as interest or hotel rates, or the need to target nationwide or specific audiences. As in *Lorillard*, Congress's failure to consider these effects renders the TCPA unconstitutional.

The Eighth Circuit found that the TCPA did not eliminate an entire medium because it merely requires the sender to first obtain the recipient's permission. Pet. App. 15a. The court found that "[a]dvertisers may obtain consent for their faxes through such means as telephone solicitation, direct mailing, and interaction with customers in their shop." *Id.* For all practical purposes, the TCPA's express prior consent requirement legislates fax advertising out of existence. It would destroy the benefit of timely dissemination of valuable commercial information such as notices about daily

fluctuations in interest rates. It also would impose substantial costs that would destroy fax advertising's other main attraction: it is inexpensive and thus available to small businesses that cannot afford television, newspaper and radio advertising. To claim as the Eighth Circuit does that prior consent can be obtained from customers already in the shop is to ignore the primary goal of advertising—to attract ***new*** business. As the District Court noted, "there is no practical way for companies to gain permission ...." Pet. App. 41a n. 26. In any event, "[o]ne need not, as a condition precedent to his right of free speech under the First Amendment, secure the permission of his auditor." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 79-80 (1983). The TCPA is unconstitutional because it eliminates a unique and essential medium of advertising.

## II. The TCPA and the Eighth Circuit Ignore The Constitutional Rights of Willing Fax Recipients.

The Court has recognized time and again that the public has a constitutional right in the free flow of commercial information. In *Edenfield v. Fane*, 507 U.S. 761 (1993), the Court recognized the "societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Id.* at 766. *Cf. Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (freedom of speech "embraces the right to distribute literature and necessarily protects the right to receive it").

As a general rule, the speaker and the audience, not the government, assess the value of information. *Edenfield*, 507 U.S. at 767. The purpose and effect of the TCPA, however, is to cut off all fax advertising of commercial goods and services absent the prior express permission or invitation. By failing to apply *Central Hudson* properly and require Congress to use more narrowly tailored alternatives (such as including fax numbers in the existing Do-Not-Call list), the Eighth Circuit allowed the TCPA to suppress commercial

speech that many recipients find beneficial and have a constitutional right to receive.

The Eighth Circuit gave short shrift to the constitutional right of willing recipients of truthful, unsolicited commercial faxes to receive that information:

> While it is true that the effect of the TCPA will be that some consumers will not receive unsolicited advertisements they might have appreciated, under the approach advocated by [defendant] there would always be individuals suffering costs and interference from unwanted advertisements. It was not unreasonable for Congress to choose a system that protects those who would otherwise be forced to bear unwanted burdens over those who wish to send and receive unsolicited fax advertising.

Pet. App. 15a.

Congress's choice was unreasonable, however, because it ignores the constitutional rights of fax machine owners who welcome fax advertising and enjoy a First Amendment right to receive such information. Congress' choice also was unreasonable because it does not allow fax machine owners to decide for themselves whether they want to receive unsolicited commercial faxes. As the Court noted in *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994), "[i]f the government wants to protect householders from unwanted solicitors, it may enforce 'No Soliciting' signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say." *Id. at* 682-83 (citing *Martin*, 319 U.S. at 143).

The Eighth Circuit, however, myopically focused on the so-called "right" of those who do not want to receive such faxes. Such an approach deprives willing recipients of their constitutional rights simply because acutely sensitive fax recipients (or, more likely, those seeking a windfall under the TCPA's damages scheme)—who the District Court found to comprise a wholly undefined percentage of the total universe of fax recipients—cannot be bothered to make a simple toll-

free telephone call or click their computer mouse to notify a fax advertiser or Do Not Fax registry that they object to receiving unsolicited commercial faxes.

The Eighth Circuit's myopia cannot be reconciled with this Court's decision in *Greater New Orleans Broad. Assoc. v. United States*, 527 U.S. 173 (1999) in which the Court gave substantial credit to the interest of the audience. *Id.* at 184-85. ("Thus, even if the broadcasters' interest in conveying these messages is entirely pecuniary, the interests of, and benefit to, the audience may be broader.")

This reasoning applies with equal force to the TCPA. Many businesses and consumers have a substantial interest in the continued receipt of faxes advertising the availability of commercial goods and services. Mortgage brokers, automobile dealerships and other businesses have an interest in the continued receipt of rate sheets from lending institutions such as Resource. Frequent travelers and travel agents likewise have an interest in the continued receipt of special rates from hotels and airlines, such as Drury. The interests of the audience in "inform[ed] consumption choices" and "price competition" are significant interests and are necessary elements for the efficient operation of a free market economy. Those interests are entitled to First Amendment protection. The TCPA and the Eighth Circuit completely disregard those interests in favor of a paternalistic statutory scheme that substitutes the judgment of Congress for that of consumers. Suppressing commercial speech from those who wish to continue receiving it is clearly unconstitutional.

The Eighth Circuit's failure to consider the constitutional rights of non-objecting recipients who welcome and rely on facsimile advertisements sets a dangerous precedent that cannot be allowed to stand.

## III. The TCPA Arbitrarily Discriminates Against Commercial Speech.

Several cases succeeding *Central Hudson* have recognized that the legislature may not place arbitrary and irrational restrictions on commercial advertising without running afoul of the First Amendment. In *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), for example, the Court struck down a city ordinance that allowed only non-commercial publications to be distributed through freestanding newsracks located on public property. In defending this ordinance, the city argued that commercial newsracks were an eyesore. The Court rejected this argument, reasoning that, because both commercial and non-commercial newsracks were equally unappealing, the ordinance's distinction between commercial and noncommercial speech bore "no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 424. The Court thus held that the ordinance was unconstitutional.

Six years later, in *Greater New Orleans Broad. Assoc.*, *supra*, the Court faced the question of whether a federal statute could prohibit advertisements for private casino gambling in states where such gambling was legal. In holding that the ban violated the First Amendment, the Court rejected the Government's argument that Indian casinos, which the statute exempted, were too isolated to warrant attention, and held that the distinction between private and tribal casinos was insufficient to abridge the freedom of speech of one class more than the other. 527 U.S. at 192-3. The Court held that a regulation may not "distinguish among the indistinct" by allowing a variety of speech that entails the same harm as that which has been proscribed. *Id.* at 195.

The TCPA likewise impermissibly purports to distinguish among the indistinct. Congress' singling out of commercial speech for suppression bears no relationship to the particular interests asserted by Congress—to prevent advertisers from using recipients' fax machines, paper and toner. The Eighth Circuit, in fact, did not dispute that each non-commercial fax

imposes the same costs upon its recipient as commercial faxes. Under *Discovery Network* and *Greater New Orleans*, then, the TCPA is unconstitutional.

The Eighth Circuit tries to justify the disparate treatment of commercial and non-commercial faxes by suggesting that non-commercial solicitations were expected and therefore acceptable. Pet. App. 10a. This distinction, however, is clearly insufficient under *Central Hudson*. By adopting Congress' bald conclusion that noncommercial solicitations would be "wanted" or "expected" more than commercial advertisements, without reference to any evidence, the Eighth Circuit ignored the presumption that "the speaker and the audience, not the Government, should be left to assess the value of truthful information about lawful conduct." *Greater New Orleans*, 527 U.S. at 195.

The TCPA arbitrarily and irrationally discriminates against commercial speech and should be struck down.

## IV. The Eighth Circuit Misconstrued This Court's Precedents in Attempting to Distinguish *Thompson's* "least restrictive means" Test.

In *Thompson v. Western States Med. Ctr.*, the Court stated that in "addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government *must* do so." 535 U.S. 357, 371 (2002) (emphasis added). The Eighth Circuit relies on *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (2002), for its proposition that *Thompson*'s "least restrictive means" test is inapplicable to the TCPA. Citing that decision, the Eighth Circuit essentially finds that the TCPA is constitutional because it regulates a "harmful delivery practice" or the "secondary effects," not the content, of the prohibited speech. The Eighth Circuit's heavy reliance on *Florida Bar* is simply misplaced.

In *Renton v. Playtime Theatres*, 475 U.S. 41 (1986), the Court upheld a regulation that applied only to a particular

category of speech; *i.e.*, adult films, because it was only that type of speech, and not the exempted speech; *i.e.*, non-adult films, that engendered the secondary effects the regulation was designed to ameliorate; *i.e.*, crime and residential blight. *Id.* U.S. at 47. In *Boos v. Barry*, 485 U.S. 312 (1987), the Court again limited this doctrine to instances when "regulations ... apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech" and not the exempted type of speech. *Id.* U.S. at 320. Stated differently, the doctrine applies only when the secondary effects are "unique" to a particular type of speech. *Id.*

Accordingly, in *Discovery Network* the Court rejected an argument essentially identical to the Eighth Circuit's analysis because "[i]n contrast to the speech at issue in *Renton*, there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on the sidewalks." 507 U.S. at 430. Similarly, there are no secondary effects attributable to unsolicited commercial fax advertisements that distinguish them from the unsolicited non-commercial fax advertisements that the TCPA permits. Both involve the very same cost shifting and interference. Because the purported effects or harms of the "act" of unsolicited faxing targeted by the TCPA are equally associated with non-commercial faxes, the Eighth Circuit's "harmful delivery practice" analysis is mistaken. *See Discovery Network*, 507 U.S. at 430.

Moreover, in relying on *Florida Bar* to dilute the "reasonable fit" test, the Eighth Circuit loosed that decision from its intellectual and factual moorings. The speech restriction in Florida *Bar* imposed a thirty-day restriction on targeted direct-mail solicitation of accident victims and their relatives by attorneys. 515 U.S. at 620. The purpose of the restriction was "to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered." *Id.* at 637. *Florida Bar* was a case of the government "acting on

behalf of entities it regulates" to enact a "short temporal ban." *Id.* at 632-633. Had the case "dealt with a broad ban of all direct-mail solicitation, whatever the time frame and whoever the recipient," the speech restriction would not have passed constitutional muster. *Id.* at 553 (citing *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988)).

In this case, the TCPA contains no limit on either the "time frame" or the "recipient." *See Florida Bar* at 632-633. Under the TCPA, there is no safe period of time to send a fax and no presumptively safe recipient—all unsolicited commercial faxes are barred regardless of when they are sent or who receives them. A faxed letter from an attorney to an existing client suggesting that it might be time to update a will or review a business practice could even be swept within the Act's purview. *See Shapero*, 486 U.S. at 472 ("Lawyer advertising is in the category of constitutionally protected commercial speech.") (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 366 (1977)). In sharp contrast, *Florida Bar*, which limited direct mail solicitations to recent accident victims for thirty days, did not even remotely approach the TCPA's sweeping ban on fax advertising. *Thompson* thus applies to the TCPA.

Under *Thompson*, a number of less restrictive alternatives to the TCPA's outright ban on unsolicited fax advertising causes the Act to fail *Central Hudson's* fourth prong, because "the Government could achieve its interests in a manner that does not restrict speech, ***or that restricts less speech***." *Thompson*, 122 S. Ct. at 1506 (emphasis added). Apart from the less restrictive alternatives used by a number of states (e.g., restricting such faxes to certain times of day, requiring the sender to maintain a toll-free number that objecting recipients may call to have their fax number removed from the sender's database), the FTC's Do Not Call registry is the most obvious less restrictive alternative. Fax numbers are merely telephone numbers, such that the registry can easily be adapted so consumers can enter their fax numbers into the registry and enjoy its protections. A consumer would be able

to do this even ***before*** receiving a single unsolicited fax. Including fax numbers on the national Do Not Call registry would ensure that the costs of that regulatory scheme would not be funded by taxpayer dollars; instead, it would be paid for by the advertisers themselves. If a fax advertiser called a number listed in the registry; *i.e.*, solicited an already objecting fax machine owner who had posted the technological equivalent of a "No Soliciting" sign, liability would at that point rightly attach. Consequently, the national Do Not Call registry provides a more narrowly tailored means to balance the First Amendment rights of fax advertisers and consumers who welcome such commercial speech, on the one hand, and the rights of objecting recipients, on the other, than does the TCPA's overly broad solution of an outright ban.

The Eighth Circuit, however, dismissed in a mere footnote the more narrowly tailored means of a "Do Not Fax" registry, without any discussion whatsoever as to why such a clearly viable alternative did not render the TCPA unconstitutional. Like Congress, the Eighth Circuit impermissibly failed to "offer[] any reason why these possibilities, alone or in combination, would be insufficient[,]" such that an outright ban "was a necessary as opposed to merely a convenient means of achieving [the government's] interests." *Thompson*, 122 S. Ct. at 1507.

*Thompson* applies and the TCPA fails its constitutional test.

## V. The TCPA Prohibits Communications Based on Established Business Relationships and Makes Unclear the Scope of Continued Permissible Communications with Existing Customers.

The TCPA defines an "unsolicited advertisement" as a fax advertisement sent to any person "without that person's prior express invitation or permission." This vague definition does not address a number of issues that arise in the course of day to day business: What exactly constitutes "prior express invitation or permission"? Must permission be obtained for

each fax advertisement sent, or is an initial grant of permission sufficient for continued communications? Does an existing business relationship satisfy the permission requirement? Can the permission requirement be waived by a course of conduct establishing that the recipient has acquiesced in the continued receipt of unsolicited advertisements? Can a business that has permission to send faxes regarding one product send advertisements for a new product without violating the statute? These vagaries have created a chilling effect on businesses such as Amici who must divine the intent of a potential recipient who publicizes a fax number.

The uncertainties present in the TCPA are illustrated by recent orders of the Federal Communication Commission. In 1992, for example, the FCC stated it was permissible to send an unsolicited fax advertisement to a recipient with whom the sender had an established business relationship. *1992 TCPA Order*, 7 FCC Rcd at 8779, para. 54, n. 87. Despite the usual deference accorded a federal agency charged with implementing a statute, numerous state courts across the country refused to follow the FCC's interpretive order, creating a conflict between state and federal enforcement of the same statute.

Despite overwhelming comments from businesses stating that such faxes were beneficial, the FCC recently reversed its position, stating that the existing business relationship would no longer satisfy the requirement of permission. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991,* Report and Order, 18 FCC Rcd 14014, para. 189 (2003). Under the new rules implemented by the FCC, "express invitation or permission" requires that the permission be in writing, include a signature, clearly indicate that the recipient consents to the receipt of fax advertisements, and identify the fax number to which the advertisements may be sent. *Id.* at para. 191. The FCC initially indicated that this new rule would be effective August 25, 2003; however, after a barrage of requests for a

stay or reconsideration, the effective date was extended to January 1, 2005, or the date the matter is decided upon reconsideration. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order on Reconsideration, FCC 03-208 (August 18, 2003). The FCC's delay and indecision reflects the vagueness of the statute.

Regardless, the practical effect of the new FCC rules is that if a bank communicates via fax with a mortgage broker with whom the bank has been doing business for years to advertise a new loan product, then it has violated the TCPA's no-fax provisions. Similarly, a hotel that has an ongoing relationship with a travel agent now may be found to have violated the TCPA by failing to secure permission before faxing an advertisement for reduced weekend room rates. Thus, the effect of the TCPA's prohibition on the faxing of commercial advertisements is that companies are prohibited from fostering relationships with existing customers by offering transactions that are mutually beneficial to the advertiser and the recipient. For this reason alone, the TCPA violates the First Amendment and should be struck down as constitutionally infirm.

## VI. The TCPA Is Irrational Because Class Action Liability Threatens to Bankrupt Businesses Such As Amici Simply For Faxing Truthful Commercial Information.

The plaintiff's class action bar has exploited the TCPA to develop a cottage industry that plunders businesses that rely on fax advertising. As noted in Petitioner's brief, these class actions are resulting in multi-million dollar settlements and verdicts across the nation due to the TCPA's strict liability scheme, which allows monetary windfalls for plaintiffs who have suffered no real harm. The statutory fine imposed by the TCPA is $500.00 per transmission. If the recipient can prove that the sender willfully and knowingly violated the statute, the fine can be increased to $1,500.00 per transmission. Trial

attorneys are now routinely filing putative class action suits for every unsolicited fax transmission their clients or they personally receive in the hopes that they will hit the jackpot and catch an advertisement that was sent to a large class of recipients by a deep pocket defendant.

These class action lawsuits pose a significant risk to businesses nationwide. Even worse, the impact of these suits on the financial services industries presents a very real risk of undermining the nation's economy. Surely, Congress did not intend to cause the potential collapse of hotel chains or FDIC-insured banks merely for sending time-sensitive information regarding the availability of financial products or hotel rooms. Ironically, if such businesses fail or are severely crippled, the TCPA will serve to cost the public much more than it saves in paper and toner.

## CONCLUSION

The decision by the Eighth Circuit is an erroneous departure from this Court's *Central Hudson* jurisprudence. That flawed decision, and the Act it upholds, deprives a vast array of mainstream businesses from using a unique and immeasurably valuable tool of commercial communication. It deprives non-objecting recipients of unsolicited faxes of their constitutional right to receive valuable, time sensitive information that they need to make intelligent decisions in fluctuating markets. It not only wreaks these constitutional injuries, but also inflicts dire financial consequences on the businesses unlucky enough to be faced with the Hobson's choice—if they are even aware of the TCPA—of advertising through the medium they require to do business, or violating a strict liability federal statute that subjects them to multi-million dollar judgments.

For the reasons stated herein and in Fax.com, Inc.'s Petition for Writ of Certiorari, this Court should grant the writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the Eighth Circuit.

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